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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6949 A-1098

JACOB JOHN DOUGAN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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JACOB JOHN DOUGAN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, Jacob John Dougan, Jr., prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Florida entered on April 9, 1981, rehearing denied, June 4, 1981.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Florida is set out in ____So. 2d___ (Fla. 1981) and is set out in Appendix A; the denial of the motion for rehearing is set out in Appendix B. The unreported order of the Circuit Court of Duval County, Florida is set out in Appendix C.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Florida Statutes and the Florida Rules of Criminal Procedure, the texts of which are set out in Appendix D hereto:

Florida Statutes §782.04 (1)

Florida Statutes §921.141

Florida Statutes §38.23

Florida Statutes §900.04

Florida Rule of Criminal Procedure 3.230

QUESTIONS PRESENTED

-1-

Whether Petitioner's death sentence was imposed in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution where the death sentence was based in part on the aggravating circumstances enumerated in Fla. Stat. §921.141 (5) (a&b) and these aggravating circumstances factually did not exist.

-2-

Whether Petitioner's death senctence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution as detailed in this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), where the trial court

at a resentencing hearing refused to even consider substantial applicable mitigating circumstances presented by Petitioner.

Whether Petitioner was denied his right to a fair resentencing proceeding before a neutral and detached judge, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution where the judge decided the issue of his own disqualification and refused to disqualify himself after the Petitioner had moved to disqualify the judge for bias and prejudice.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the QUESTIONS PRESENTED were raised on appeal to the Supreme Court of Florida which affirmed the rulings of trial court.

STATEMENT OF THE CASE

In March 1975, Petitioner, Jacob Dougan, was convicted of first degree murder[1] and sentenced to death. The judgement and sentence was affirmed by the Supreme Court of Florida. Barclay and Dougan v. State, 343 So. 2d 1266 (Fla. 1977). Certiorari was denied by this Court. Dougan v. Florida, 439 U.S. 892 (1978).

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1. Fla. Stat. §782.04(1)

Pursuant to this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court of Florida vacated Petitioner's death sentence and remanded the case to the trial court for a new hearing to provide Petitioner an opportunity to rebut the presentence report in his case. Barclay and Dougan v. State, 362 So. 2d 657 (Fla. 1978).

Prior to the resentencing proceeding, Petitoner, by written motion and written amendment to that motion, moved to disqualify the judge for bias and prejudice (RI53-79; 81-86)[2]; the trial judge refused to disqualify himself (RI 80;87).

The resentencing hearing was conducted on August 21, 22 and 23, 1979. Twenty-six (26) witnesses testified on behalf of Petitioner, Jacob Dougan, at his resentencing hearing. Among these twenty-six witnesses were two attorneys, the Executive Director of the Northeast Florida Community Action Agency, an administrator and planner for the Jacksonville, Florida Area Agency on the Aging, the Staff Director of Jacksonville's Neighborhood Resource Center, a grant writer with the Greater Jacksonville Consultants, Inc., the president of the Jacksonville branch of the N.A.A.C.P., a correctional counselor with the State of Florida Department of Corrections, a high school principal, a Duval County,Florida school teacher, a program developer for Florida Junior College, and other civic

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2. The Record on Appeal in the Supreme Court of Florida of Petitioner's resentencing proceeding is contained in six (6) volumes numbered consecutively I-VI; the Florida Supreme Court later supplemented the record with the addition of the original presentence report. References to this record will be designated "R" followed by the appropriate volume and page number; references to the presentence report will be designated by "PSI" followed by the appropriate page number. References to the record of Petitioner's trial in 1975 will be designated "R Trial" followed by the appropriate volume and page number.

minded members of the Jacksonville, Florida community. (RIII 14,31,40,47,89,96,107,138,139; RIV 58, 63, 95, 139, 140).

Essentially, these witnesses testified to rebut the adverse allegations concerning Jacob Dougan's character contained in the original presentence report in this case.

Jacob Dougan attended high school in the Jacksonville, Florida community; at his high school Petitioner was a student leader and member of the student council. He was also an active participant in the Boy Scouts, earning the coveted rank of Eagle Scout; he displayed all of those positive character traits expected of an Eagle Scout (RIII 139, 140; RIV 79,96,98).

After high school, Jacob Dougan briefly attended college in Tallahassee, Florida; he then joined the United States Air Force where he served his country in the Vietnam War (RIII 127,130).

After he returned from the service in the late 1960's, until his arrest in this case in 1974, Petitioner contributed most of his time to numerous social programs in the Jacksonville area.

Jacob Dougan was actively involved in directing the Meals on Wheels Program, a program set up to provide free hot meals to the low-income elderly and disabled persons of his community. Petitioner personally went to groceries and other businesses in the community to solicit donations of food and clothing for the poor people served by the program; he personally assisted in serving the meals. When an elderly or disabled person served by the Meals on Wheels Program was without transportation to reach the place where the food and clothing was distributed, Petitioner would personally arrange for transportation for that person (RIII 15, 31 52, 65, 76, 121, 122, 128; RIV 122).

Jacob Dougan was also an active participant in the Senior Protection Program, a program established to check with the senior citizens of the neighborhood daily to see that they were okay and were receiving the basic necessities of life (RIII 110).

Petitioner was actively involved in obtaining adequate health care for the low-income people of the Jacksonville, Florida community. He personally recruited volunteer doctors and nurses to provide free health care services at the Neighborhood Health Center on Jacksonville's Eastside (RIII 49-50).

He was one of the founders of the Sickle Cell Anemia Detection Program which was involved in providing screening and medical treatment services as well as community education concerning this dangerous disease. Petitioner was actively involved both in securing volunteer doctors and nurses for the medical services provided by the program and with the community education aspect (RIII 32, 48, 49, 50, 63, 75).

Jacob Dougan was a member of the Board of Directors of Neighborhood Services Program on Jacksonville's Eastside. This was a federally funded program established to assist in running social services programs on a neighborhood level. He was elected to the Board of Directors by the black and white citizens of the community (RIII 40, 42, 54, 90, 97; RIV 64, 140).

Petitioner worked with children and young people in the Jacksonville area. He worked as a coach for Little League teams in the community. He was actively involved with the Sherriff's Department Youth Program which was established to promote a better relationship between young people and the law enforcement agencies in Jacksonville. He helped recruit

children for the local Head Start Program. He donated money to sponsor children so they could attend the Young Life Christian Organization summer camps; he always contributed to help the most needy child. He helped to take children on educational field trips (e.g., trips to the newspaper, food processing plant, etc.). He assisted the director of the Drug Alternative Center with his program. (RIII 63,64,77,78,92,98,119,121,135, 136,137; RIV 141,142).

Jacob Dougan helped low-income kids seek out grants and scholarships for college. At Christmastime, he helped collect toys for Christmas presents for poor children (RIII 53,127).

Jacob Dougan was also involved in various other community programs such as Walnut House, a halfway house for paroled prisoners, the ex-offenders program, urban renewal committee, etc. (RIII 31,40,63,75,91; RIV 65,66,122,141).

Jacob Dougan was never paid for any of his contributions to the community. These programs benefitted both the black and white citizens of the community; Jacob Dougan always worked as a partner with the black and white people of the community and was respected by both. (RIII 17,35,42,54,66,78,98,100, 110, RIV 141,142).

Since his conviction, Petitioner has been an excellent prisoner on death row. He interacts well with both guards and other prisoners, black people and white people. He helps write letters for illiterate death row prisoners (RIV 58-61).

As Petitioner's death row counselor testified:

> "Well, I thought [Petitioner] was a very good [inmate] because in the prison system you don't have a person for every man that's incarcerated and a lot of times those people that are incarcerated, some help out on various -- in various situations and [Petitioner] was one of those that did. He showed -- had a leadership role and it was a positive one."
>
> (R IV 60).

The State presented no evidence to rebut any of the testimony presented by Petitioner. In fact, after Petitioner's first six (6) witnesses had testified, the State conceded that their testimony was true. (R III 82-83).

The trial court resentenced Petitioner to death (RI 122-157). In its lengthy resentencing order, the trial court purported to analyze the applicability of the aggravating and mitigating factors detailed in Fla. Stat. §921.141 (5) and (6).

In its findings of aggravating circumstances, the trial court found, among other factors, that Fla. Stat. §921.141. (5)(a) ["the capital felony was committed by a person under sentence of imprisonment."] and §921.141 (5) (b) ["The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."] existed in Petitioner's case. (RI 145;146). These were factually untrue.

Petitioner has never been convicted of any felony; Petitioner was not under a sentence of imprisonment at the time of the alleged commission of the capital felony. Nowhere in either the trial record or the record of the resentencing proceeding (or anywhere else) is there one word to substantiate these aggravating circumstances.

In its analysis of mitigating circumstances (RI 138-144), the trial court considered only those mitigating factors enumerated in Fla. Stat. §921.141 (6) (a-g). No mitigating factors outside of the statutorily enumerated mitigating factors were considered.

The Supreme Court of Florida affirmed the trial court in all respects. Dougan v. State, ____So. 2d ____ (Fla. 1981) [Appendix A].

REASONS FOR GRANTING THE WRIT

1. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE DEATH SENTENCE WAS BASED IN PART ON THE AGGRAVATING CIRCUMSTANCES ENUMERATED IN FLA. STAT. §921.141(5)(a and b) AND THESE AGGRAVATING CIRCUMSTANCES FACTUALLY DID NOT EXIST.

". . .[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die. . ." Gregg v. Georgia, 428 U.S. 153, 190 (1976). Petitioner, in his resentencing determination, was denied this right most fundamental to a person facing the ultimate penalty of death.

Under Florida's death penalty statute, the sentencing judge is required to weigh statutory aggravating circumstances [Fla. Stat. §921.141(5)] against any mitigating factors [Fla. Stat. §921.141(6)]. Before the sentence of death may be imposed, the sentencing judge must find that sufficient statutory aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. Fla. Stat. §921.141(3).

This difficult weighing process was blown out of balance by the unbelievably bizarre findings of the judge who resentenced

Petitioner to death.

Among its findings of statutory aggravating circumstances, the resentencing court found that the aggravating circumstances enumerated in Fla. Stat. §921.141(5)(a & b)[3] existed in Petitioner's case.

The Florida Supreme Court has held that Fla. Stat. §921.141 (a) is properly applied to persons in fact imprisoned at the time of the commission of the capital felony, persons on parole at the time of commission of the capital felony, Aldridge v. State, 351 So. 2d 942(Fla. 1977), persons on weekend furlough at the time of the commission of the capital felony, Darden v. State, 329 So. 2d 287 (Fla. 1976), and to escapees, Adams v. State, 341 So. 2d 765 (Fla. 1977). This aggravating circumstance either facially or as applied is in no way applicable to persons without any restraint on liberty at the time of the offense charged.

Petitioner was not under sentence of imprisonment either at the time of the crime's commission or at the time of sentencing; he was not an escapee; he was not on probation, parole or furlough. This aggravating circumstance cannot, under any proper construction, be applied to Petitioner.

Nevertheless, in applying Fla. Stat. §921.141(5)(a), the resentencing court first stated that "Dougan was not under sentence of imprisonment when convicted of this murder," and then paradoxically concluded that the aggravating circumstance existed. (RI 145).

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3. Fla. Stat. §921.141(5)(a): "The capital felony was committed by a person under sentence of imprisonment."; §921.141(5)(b): "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

More unbelievably, the resentencing court found Fla. Stat. §921.141(5)(b) to exist despite the fact that Petitioner had not been previously convicted of any felony, much less the "capital felony" or "felony involving the use or threat of violence to the person" required by the statute.

The resentencing court did not dispute the facts that Petitioner had not been previously convicted of any felony or that Petitioner was not under any sentence of imprisonment at the time of the alleged commission of the capital felony. Rather, the court based its findings of the §(5)(a) and (b) aggravating circumstances solely on two 1971 contempt of court citations.[4] (RI 145, 146).

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980), this Court stated:

> "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not' [cite omitted].
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

A state has failed in its responsibility to properly "tailor and apply its law" when a death sentence can be based on factors which do not exist.

Under Florida law, when an improper aggravating circumstance is found, the death penalty will be reversed if any mitigating factors also exist. Elledge v. State, 346 So. 2d 998

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4. There was no evidence concerning these contempt of court citations introduced at either Petitioner's trial or his resentencing hearing; the sole reference in the record to the contempt citations is contained in the Presentence Report. According to the Presentence Report, Petitioner served a total of one day in jail in 1971 for contempt. (PSI at p. 4).

Under Florida law, aggravating circumstances must be proven beyond a reasonable doubt. Alford v. State, 307 So. 2d 433 (Fla. 1975); State v. Dixon, 283 So. 2d 1 (1973). Aggravating circumstances cannot be based solely on information contained in the presentence report. Williams v. State, 386 So. 2d. 538, 542-543 (Fla. 1980).

(Fla. 1977); Menendez v. State, 368 So. 2d 1278(Fla. 1979). The Florida court has also, in one case, vacated a death sentence when improper aggravating circumstances were found, yet no mitigation existed. Williams v. State, supra.

This position is constitutionally required. Since the capital sentencing decision is based on a weighing of aggravating and mitigating factors, [Fla. Stat. §921.141(3)], it cannot be determined to what extent the improper factors affected the balance. Cf. Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); Stromberg v. California, 183 U.S. 359 (1931).

In Proffit v. Florida, 428 U.S. 242 (1976), this Court relied upon the appellate review in the Supreme Court of Florida to protect against an arbitrary application of the death penalty:

> "The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted' [cite ommited]"
> 428 U.S. at 252-254 (emphasis supplied)
>
> * * * * * * * * *
>
> "If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. These reasons, and the evidence supporting them, are conscientiously reviewed by a court which because of its statewide jurisdiction, can assure consistency, fairness and rationality in the evenhanded operation of the state law."
> 428 U.S. at 259-260.

With a thunderous crash, the Supreme Court of Florida, in Petitioner's case, has dropped its responsibility to "review and reweigh" the aggravating circumstances. The Supreme Court of Florida flatly refused to review the aggravating circumstances found in Petitioner's case.

Apparently, the Florida court's only justification for refusing to conduct this review was that appellate review of the sentence is not required after resentencing pursuant to a Gardner v. Florida, supra remand.[5] Dougan v. State, ___So. 2d___(Fla. 1981) [Appendix A at p. 2-3]. This position is constitutionally invalid.

Petitioner's original death sentence was vacated, Barclay and Dougan v. State, 362 So. 2d 657 (Fla. 1978); therefore, at the time of remand, Petitioner had no death sentence. Petitioner's present death sentence is based on a written sentencing order, analyzing aggravating and mitigating circumstances, issued by the court at the time of resentencing (RI 122-157). As stated in dissent by Justices McDonald and Overton of the Supreme Court of Florida:

> "The original sentence in this cause was vacated. If execution as ordered is to take place, then that execution must be predicated on the last imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own. This sentence does not.
>
> After previously stating that the facts of contempt were unknown, the trial judge wrongfully found that two criminal contempt convictions constituted the aggravating factors of being under a sentence of imprisonment when the murder was committed and conviction of a felony involving the use of threat or violence. Neither is true."
> Dougan v. State, ___So. 2d___(Fla. 1981) [Appendix A at p. 4] (McDonald and Overton, JJ, dissenting)

Petitioner's present sentence of death is based on aggravating factors that do not exist. The Supreme Court of Florida has failed to "assure rationality" in the imposition of this death sentence.

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5. This position is curious since the Supreme Court of Florida has previously held that a Gardner remand is part of the appellate process. Messer v. State, 384 So. 2d 644 (1980).

2. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS DETAILED IN THIS COURT'S DECISION IN LOCKETT v. OHIO, 438 U.S. 586 (1978), WHERE THE TRIAL COURT AT A RESENTENCE HEARING REFUSED TO EVEN CONSIDER SUBSTANTIAL APPLICABLE MITIGATING CIRCUMSTANCES PRESENTED BY PETITIONER.

In its resentencing order, the trial court's analysis of mitigating circumstances was limited to the mitigating circumstances enumerated in Fla. Stat. §921.141(6) [RI 138-144]. The resentencing court refused to find any of these mitigating circumstances to exist in Petitioner's case.

At least one of these statutory mitigating circumstances Fla. Stat. §921.141(6)(a) ["The defendant has no significant history of prior criminal activity"], clearly applies to Petitioner.[6] The Supreme Court of Florida, in its initial review of Petitioner's death sentence, stated: "Dougan, who was 27 at the time, had no significant history of prior criminal activitiy..." Barclay & Dougan v. State, 343 So. 2d at 1270. No evidence was presented at the resentencing proceeding to rebut this fact.

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6. Fla. Stat. §921.141(6)(g) ["The age of the defendant at the time of the crime"] should also be applicable. This circumstance would not be based Petitioner's youth; Jacob Dougan was 27 at the time of the alleged offense. Rather, in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), the Supreme Court of Florida held that §921.141(6)(g) was applicable in reviewing, "the length of time that the defendant has obeyed the laws in determining whether of not one explosion of total criminality warrants the extinction of life."

Nevertheless, the resentencing court refused to find this mitigating circumstance. The court's decision was based not on any crime committed by petitioner, but rather: "because the facts of the contempt of court are not known at this time" (RI 139)[7].

Even more egregious than the resentencing court's refusal to find applicable statutory mitigating circumstances, was its refusal to even consider mitigating circumstances not specifically enumerated by the statute.

> ". . .we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."
>
> Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in the original)

The elements of non-statutory mitigation presented by Petitioner at his resentencing hearing have been more fully discussed in the STATEMENT OF THE CASE, supra; they will be only briefly summarized here:

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7. The power of contempt is given to courts to enforce their orders, punish refusals to obey and maintain courtroom decorum. Fla. Stat. §§38.23; 900.04. Nowhere in Florida law is contempt designated as a crime. Indeed, contempt can be cited summarily with no right to trial or right to confront witnesses.

However, even if contempt could be considered a crime, a contempt citation resulting in one day's incarceration could hardly be considered a "significant history" of criminal activity. Interestingly, the Presentence Report does not indicate whether the contempt was civil or criminal contempt. (PSI at p. 4).

Petitioner has built an impressive record of prior good behavior. He was an excellent student and an Eagle Scout (RIII 139, 140; RIV 79, 96, 98).

Petitioner served his country in the United States Air Force during the Vietnam War (RIII 127, 130). The fact that the trial court ignored Petitioner's military service is evidenced by this comment in the sentencing report:

> "Had the defendant been exposed to the carnage of the battlefields... instead of movies, television programs and revolutionary tracts...then perhaps his thoughts and actions would have taken a less violent course." (RI 156).

After he returned from the service, until his arrest in this case, Petitioner contributed much of his time to numerous social programs in the Jacksonville area. His activities included hot meal programs for the elderly and disabled, Senior Protection Program for the elderly, health care programs for the poor, Sickle Cell Anemia Detection Program, Board of Directors of the the Neighborhood Service Program, Little League coach, Sheriff's department Youth Program, Head Start Program, collecting toys for poor children at Christmas, ex-offenders program and many others. (RIII and IV, passim).

Since his conviction, Petitioner has been an excellent inmate on death row, helping both guards and other inmates (RIV 58-61).

The resentencing court refused to even consider any of these positive contributions as possible non-statutory mitigating circumstances.

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human brings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of of the penalty of death."
>
> Woodson v. North Carolina, 428 U.S. 280 at 304 (1976).

The Supreme Court of Florida refused to review applicable mitigating circumstances or the trial court's failure to consider mitigating circumstances. Again, that court's only explanation was that such review was not necessary on appeal of the imposition of the death sentence after the original death sentence had been vacated for Gardner relief.[8] Dougan v. State, ___So. 2d___ (Fla. 1981) [Appendix A at p. 2-3].

Again, this position is constitutionally invalid. Much of the evidence of mitigating factors presented by Petitioner directly rebutted adverse allegations concerning Petitioner's character contained in the confidential section of the Presentence Report.[9]

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8. In contradiction, the Supreme Court of Florida had previously held that the scope of a Gardner remand was to consider both the Presentence Report "as well as other matters properly considered by the trial court concerning appellant's sentence..." Funchess v. State, 367 So. 2d 1007 (Fla. 1979). (emphasis supplied).

9. The confidential section of the Presentence Report alleged that Petitioner was a racist who spent much of his time reading and writing revolutionary political material; that Petitioner instructed young people in revolutionary politics; and other character slurs (PSI, Confidential Section). None of these allegations or character slurs were supported by substantial facts. The Presentence Report discussed none of the applicable mitigating factors.

At the resentencing hearing, the author of the Presentence Report testified that the facts contained in the report were developed almost exclusively from prosecution and police sources. (RIV 131)

As stated by Justices McDonald and Overton of the Supreme Court of Florida in dissent:

> "Besides finding at least two unfounded aggravating factors, the trial judge failed to recognize one statutory mitigating factor[3] [No significant prior criminal activity]. Also, the defendant presented substantial nonstatutory mitigating evidence. This evidence was properly presented and related to information on the defendant's background, which had been addressed in the pretrial [presentence] report. While the trial judge was not required to agree with such evidence, he should at least have considered it and made some reference to it in the weighing process."
>
> Dougan v. State, ___ So. 2d ___ (Fla. 1981) [Appendix A at p. 4-5] (McDonald and Overton, JJ, dissenting).

3. PETITIONER WAS DENIED HIS RIGHT TO A FAIR RESENTENCING PROCEEDING BEFORE A NEUTRAL AND DETACHED JUDGE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE JUDGE DECIDED THE ISSUE OF HIS OWN DISQUALIFICATION AND REFUSED TO DISQUALIFY HIMSELF AFTER THE PETITIONER HAD MOVED TO DISQUALIFY THE JUDGE FOR BIAS AND PREJUDICE.

Prior to the resentencing hearing, Petitioner filed a motion to disqualify Judge R. Hudson Olliff as judge (RI 53-79); Petitioner subsequently amended that motion (RI 81). The motion and amendment thereto were filed in complete compliance with applicable Florida Law. Florida Rule of Criminal Procedure 3.230. The facts in support of the motion were supported by affidavits, the trial record in this case and other matters of public record.

Under the procedure outlined in Fla. R. Crim. P. 3.230, it is the duty of the judge to examine the motion for its legal sufficiency and then to step down. It is not for the judge to adjudicate the issue of his disqualification.

Under Florida law, legal sufficiency is shown if the facts alleged in the motion show a well founded fear on movant's part that he will not receive a fair hearing at the hands of the judge. State ex rel Brown v. Dewell, 179 So. 695 (Fla. 1938).

At the hearing on the motion, the judge refused to step down after an examination of the motion (RII 98). Petitioner's counsel then argued that if the judge would not automatically

step down, then Petitioner should be allowed to present evidence on behalf of the motion to disqualify the judge (RII 89-91; 93-95). The court not only refused to allow the presentation of evidence, he also refused to allow Petitioner's counsel to make an offer of proof of the evidence which could be presented (RII 98-100).

The judge also attempted, from the bench, to refute some of the facts alleged in the motion (RII 96-98).

Judge Olliff decided the issue of his own disqualification and refused to disqualify himself. (RI 80, 87).

Fla. R. Crim. P. 3.230 is substantially similar to the federal procedural standard for disqualification of a judge detailed in 28 U.S.C. §144. Under the federal standard, the judge cannot determine the truth of the allegations made against him; if the facts alleged, if true, would create a fear of bias in the party's mind, the judge must step down. Burger v. United States, 255 U.S. 22, 34-36 (1921).

An analysis of the five (5) grounds alleged in the motion to disqualify and the amendment to that motion will show Petitioner's well-founded fear of bias on the part of the trial judge:

1) The trial judge holds a deep personal bias against Petitioner; this bias extends beyond the fact that the judge had previously sentenced Petitioner to death.

In his original sentencing order in this case (R Trial II 217-247) the judge compared Petitioner with the Nazis of World War II; he deviated from his statutory obligation of considering solely aggravating and mitigating factors to inject his personal experiences and beliefs into the sentence. The judge spoke of the Nazi concentration camps and the atrocities committed in those camps. (R Trial II 219-220).

It is inconceivable that a judge who has compared Petitioner with the Nazis of World War II, the group whose name and actions have become synonomous with the mass murder of millions, genocide and atrocities of the most unthinkable nature could sit fairly and impartially, without preconceptions as to sentence, and determine Petitioner's fate.

Is it reasonable to believe that Petitioner would be without a well founded fear concerning the bias of a man who compares him with Hitler's Nazis?

2) The judge maintains memberships in three (3) organizations which practice racial discrimination against black persons. These three organizations have no black members, do not admit black persons and have never allowed membership to a black person (RI 83-84).

Petitioner, a black person, would certainly have a well founded fear of prejudice on the part of a judge who decides whether he lives or dies and that judge engages in racial discrimination. How can a judge make the difficult and subtle judgments of character required in weighing aggravating and mitigating circumstances when the person standing before him is black and the judge is a person who practices racial discrimination?

Barely a page passes in the resentencing order (RI 122-157) where the trial court does not make reference to the issue of race. The trial judge has made race the focal point of Petitioner's sentence; if this is the major issue, how could the trial court be fair when the trier of fact, in his conscious personal decisions on issues of race, has shown himself to participate in acts of racial discrimination?

3) In both Petitioner's case and other capital cases, the trial judge has engaged in ex parte conversations concerning these cases with attorneys of the State of Florida Attorney General's office.

The trial judge's actions created a fear in Petitioner's mind that the trial judge had developed a pattern of discussing ex parte with representatives of the State issues involved in capital cases pending before him.

Canon 3 of the Code of Judicial Conduct states:

> "(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

Even if an ex parte communication takes place it must be with a "disinterested expert." The Office of the Attorney General represents the State of Florida in criminal proceedings. Fla. Stat. §16.01. An Assistant Attorney General can hardly be characterized as disinterested.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), this Court recognized that a state Attorney General could not be considered neutral and detached in a state criminal prosecution.

Why would the State find it desirable to engage in conversations with the judge without participation by the defense if not to improperly influence the judge? Why would the judge find it desirable to engage in conversations with the State without participation by the defense if not to hide something from the defense?

4) The trial judge, ex parte called an Assistant Attorney General of the State of Florida to ask him to seek review in the United States Supreme Court of the Supreme Court of Florida's decision granting relief pursuant to Gardner v. Florida, supra, in the case of Dobbert v. State (Fla. Sup. Ct. No. 45,558). Petitioner's case was also remanded for Gardner relief.

Not only was this conversation an improper ex parte communication as discussed above, it also shows a prosecutorial attitude on the part of the trial judge concerning Gardner relief. Apparently the trial judge has some disagreement concerning the propriety of Gardner relief.

Certainly, no judge likes to be reversed; however, a judge should be toally disintereseted as to the result of a case as long as the law is followed. It is inconsistent with the concept of an impartial judiciary for a judge to actively seek a specific legal action against a party before him.

If a trial judge's order is vacated, his only interest should be to proceed properly on remand, not to seek further review of the action to the detriment of a party before him.

The trial judge's actions created a well founded fear in Petitioner mind that the trial judge had a prosecutorial attitude towards Gardner relief.

5) The trial judge, by his actions in capital cases tried before him, has shown a biased predisposition towards imposing the death penalty and does not properly conduct the painstaking analysis required by Fla. Stat. §921.141.

The trial judge has sentenced five (5) persons to death: Dobbert v. State (Fla. Sup. Ct. No. 45,558); Carnes v. State, (Fla. Sup. Ct. No. 46,673); Lewis v. State (Fla. Sup. Ct. No. 50,851); Barclay & Dougan v. State (Fla. Sup. Ct. No. 47,260).

Four (4) of these persons had received jury recommendations of life imprisonment:

> ". . .in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."
>
> Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Compare the following language from the death sentences imposed by the trial judge:

Dobbert

CONCLUSION OF COURT

> "There are sufficient and great aggravating circumstances which exist to justify the sentence of death.
>
> In concluding my findings I would like to point out that my 22 years of legal experience have been almost exclusively in the field of criminal law.
>
> The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years and a Criminal Court Judge and a Circuit Judge-Felony Division for three and one half years. During this 22 years I have defended, prosecuted and held trial of almost every type of serious crime.
>
> During these years of legal experience, I have never known of a more heinous, atrocious and cruel crime than this one.
>
> My experience with the sordid, tragic and violent side of life has not been confined to the courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have had friends blown to bits and have seen death and suffering in every conceivable form.
>
> I am not easily shocked or effected by tragedy or cruelty-but this murder of a helpless, defenseless and innocent child is the most cruel, atrocious and heinous crime I have ever personally known of-and it is deserving of no sentence but death."
>
> Sentencing order at pp. 19-20.

Carnes

"My 22 years of legal experience have been almost exclusively in the field of Criminal law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office on major crimes, A Prosecutor ror eight and one half years and a Criminal Court Judge and Circuit Court Judge-Felony Division-for almost four years. During these 22 years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have seen frieneds blown to bits and have seen death and suffering in almost every conceivable form.

I am not easily shocked or moved by tragedy-but this was an especially shocking crime. The defendant took the life of another human being by a murder that was heinous, atrocious and cruel-and he deserves to forfeit his life."

Sentencing order at pp. 15-16.

Lewis

"In concluding my findings I would like to point out that my 24 years of legal experience have been almost exclusively in the field of criminal law.

The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years, and Advisor to the Public Defender's Office and a Criminal Court and Circuit Court Judge-Felony Division-for 6 years. That during this 24 years I have defended, prosecuted and held trial of almost every type of serious crime.

My experience with the sordid, tragic and violent side of life has not been confined to the courtroom. During World War II, I was a United States Army Paratrooper and served in ground combat in Europe. I have seen death and suffering in almost every conceivable form.

I am not easily shocked or affected by tragedy or cruelty-but this is an especially heinous, atrocious and cruel crime-and is deserving of no sentence but death."

Sentencing order at p. 16.

> "My 23 years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one half years and a Criminal Court and Circuit Court Judge-Felony Division-for almost four and one half years. During these 23 years I have defended, prosecuted and held trial in almost every type of serious crime.
>
> Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.
>
> My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Soldiers, walked the battle fields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial discrimination. . .
>
> Having set forth my personal experiences above it is understandable that I am not easily shocked or moved by tragedy-but this present murder and call for racial war is especially shocking and meet every definition of heinous, atrocious and cruel. The perpetrators thereby forfeit further right to life-for certainly their lives are no more sacred than that of their innocent eighteen year old victim, Stephen Anthony Orlando."
>
> (R Trial II 245-246)

This type of photocopy sentencing does not comport with the guided discretion approved by this Court in Proffit v. Florida, supra.

That the trial judge considers the death penalty the only proper punishment for murder is illustrated by his statement in the Lewis sentence:

> "The sanctity of life is revered by all thinking men-yet can it be said that the life of a convicted murderer is more precious than that of the murder victim? Obviously not, and therefore, the maximum penalty of death must be imposed."
>
> Sentencing order at pp. 17-18.

Although at least some of the grounds forwarded by Petitioner in support of the disqualification of the judge were arguably judicial rather than extra-judicial acts, judicial acts should serve as the basis of disqualification where such bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party. E.g., Davis v. Board of School Cm'rs of Mobile County, 517 F. 2d 1044 (5th Cir. 1975). Such a case exists here.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party, Mr. David Gauldin, Assistant Attorney General, State of Florida, The Capitol, Tallahasseee, Florida 32301, with three (3) copies of the foregoing Petition for Writ of Certiorari and the Appendix thereto by placing same in the United States Mail with adequate first-class postage attached.

This 1st day of July, 1981.

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